



1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
MCLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2829

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September 9, 2008

Carol A. Laham
202.719.7391
claham@frc.gov

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OFFICE OF GENERAL
COUNSEL

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VIA HAND DELIVERY

Thomasenia P. Duncan
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Matter Under Review 6038 (Club for Growth State Action)

Dear Ms. Duncan:

This office represents Club for Growth State Action ("CFGSA"), which has received a complaint ("Complaint") designated Matter Under Review ("MUR" or "Matter") 6038 by the Federal Election Commission ("FEC" or "Commission").

This Complaint is barred by the doctrine of res judicata and collateral estoppel. Moreover, the purported facts put forward in the affidavit attached to the Complaint would not amount to coordination under the Commission's regulations even if true. Finally, based on the attached affidavit of Christopher K. Baker dated September 8, 2008 ("2008 Baker Aff.") (attached at Tab 1), and the affidavit of Christopher Baker filed in 2006 in MUR 5774 (attached as Tab A to the 2008 Baker affidavit), it is clear that CFGSA did not coordinate its 2006 Colorado mailings with the Lamborn campaign. As a result, the Commission should dismiss the Complaint and find once again no reason to believe that CFGSA violated the Federal Election Campaign Act of 1971, as amended ("FECA").

THE COMPLAINT

There is no new "Complaint" in this Matter. Instead, there is a request to reopen a prior investigation,¹ Letter from Matthew J. Werner to the Office of General Counsel, dated July 1, 2008, at 1, which references the Complaint in previously-adjudicated MUR 5774. The materials submitted in this Matter also include a summary of portions of the First General Counsel's Report in MUR 5774, the affidavit of Alan Farina, and a summary of the Farina affidavit. No new material information is provided in the submissions.

¹ Note that the complainant in MUR 5774 withdrew his complaint. Letter of Robert S. Gardner to Jeff S. Jordan, dated Oct. 30, 2006.

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The comments about the CFGSA and its consultant, Blue Point, LLC ("Blue Point"), in the Farina affidavit are very brief. In short, Mr. Farina reports that Tactical Data Solutions ("Tactical Data") sold a voter list to Blue Point, a fact which was already established in the initial proceeding. Farina Aff. ¶¶ 9, 12. In addition, Mr. Farina presents unverified hearsay to the effect that Jon Hotaling, a board member of the list vendor Tactical Data and campaign manger for Doug Lamborn's 2006 campaign for the House seat in Colorado's 5th Congressional District, "referred Blue Point to [Tactical Data]." Farina Aff. ¶ 11.

As shown below, this non-Complaint should be dismissed for a number of reasons.

THE POSTURE OF THE CASE AND THE DOCTRINE OF RES JUDICATA AND COLLATERAL ESTOPPEL

A. The Posture of the Case

In MUR 5774, the Commission found "no reason to believe that Club for Growth State Action violated 2 U.S.C. § 441b by making prohibited in-kind contributions in the form of coordinated communications." Letter from Lawrence H. Norton to Carol A. Laham, dated Dec. 22, 2006.

B. Reconsideration of this Amended Complaint Is Barred by the Doctrine of Res Judicata and Collateral Estoppel

As noted above, the FEC already found "no reason to believe that Club for Growth State Action violated 2 U.S.C. § 441b by making prohibited in-kind contributions in the form of coordinated communications." MUR 5774, Letter from Lawrence H. Norton to Carol A. Laham, dated Dec. 22, 2006. Now, nearly two years later, this complainant has tried to circumvent the finality of the enforcement process by raising the same issues that were dismissed against CFGSA in MUR 5774 and, in fact, "incorporat[ing] the prior allegations made in the complaint in MUR 5774 by reference." Werner Letter, at 2. As such, this newly filed "complaint" is barred by res judicata and collateral estoppel.

An adjudicative determination by an administrative agency "has the same effect under the rules of res judicata . . . as a judgment of a court." Restatement (Second), Judgments § 83(1). The FEC's decision in MUR 5774 was a final decision, in which CFGSA was given notice, presented evidence and legal arguments, and rebutted the complainant's arguments. *Id.* § 83(2). There can be no question that

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this was a valid judgment, pursuant to the FEC's statutorily defined powers. In fact, the complainant in that MUR did not seek judicial review of the FEC's dismissal within sixty days, as was his statutory right. *See* 2 U.S.C. § 437g(a)(8). There also can be no question that the FEC ruled precisely on the same issue brought in this second complaint, *i.e.*, whether CFGSA coordinated its activities with the Lamborn campaign with respect to the very same mail pieces at issue in MUR 5774.

To allow complainants to bring the same complaint over and over again, when the underlying issue has already been reviewed and dismissed by the FEC, would seriously undermine the Commission's enforcement process. Those involved in FEC proceedings rely on the finality of FEC decisions. Were the FEC to entertain this second complaint, this complainant and future complainants would be emboldened to repeatedly make the same allegations before the FEC without regard for its earlier rulings. Such actions would impose an undue burden not only on the respondents to those complaints, but also on the FEC itself. In order to avoid a precedent that would force a party to relitigate the same issue multiple times in the same venue, the FEC must dismiss this complaint with prejudice on the grounds of *res judicata* and collateral estoppel.

ALTERNATE GROUNDS FOR DISMISSAL

As an alternative to the fact that this has already been adjudicated, the Commission should dismiss this Complaint and find no reason to believe that CFGSA violated the FECA based on the evidence put into the record by CFGSA. In short, CFGSA did not coordinate its mailings with the Lamborn campaign or its agents through the common vendor conduct standard, the material involvement conduct standard, or otherwise. Even if the allegations against CFGSA and its vendor Blue Point were true, the alleged activity still would not qualify as coordination.

1. The Coordination Regulations

According to the FEC's regulations, a "coordinated communication" is a communication by a third party that meets both the content and conduct standards contained in the regulations. 11 C.F.R. § 109.21(a). Assuming that the mail pieces at issue meet the requirements of 11 C.F.R. § 109.21(c)(4), the Complaint focuses on the conduct standard of the FEC regulations. More narrowly, the conduct factors directly implicated by the Complaint relate to "*material involvement*" and "*common vendors*."

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The *material involvement* conduct standard is met if

a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing is materially involved in decisions regarding:

- (i) The content of the communication;
- (ii) The intended audience for the communication;
- (iii) The means or mode of the communication;
- (iv) The specific media outlet used for the communication;
- (v) The timing or frequency of the communication; or
- (vi) The size or prominence of a printed communication, or the duration of a communication by means of a broadcast, cable, or satellite.

11 C.F.R. § 109.21(d)(2).

The *common vendor* conduct standard involves the use of certain types of commercial vendors by the campaign, a political party committee, or their agents and the person making the communication at issue. *Id.* § 109.21(d)(4).

Nonetheless, the use of a common vendor is not a flat prohibition. *See* 68 Fed. Reg. 421, 436 (Jan. 3, 2003) (Explanation and Justification on Coordinated and Independent Expenditures). The common vendor standard also requires the following be used for or conveyed to the person paying for the communication:

- (A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

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(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

11 C.F.R. § 109.21(d)(4)(iii). Coordination does not result if the material information used or conveyed comes from a publicly available source. *Id.*

2. Alleged Activity Does Not Rise to Coordination

The result of the previous adjudication of this Matter would still be applicable even if (a) the Commission were to consider the new allegations in the complainant's materials; and (b) the allegations were true. Coordination does not result from using a common voter list vendor in the way allegedly employed by CFGSA's consultant, Blue Point.

Voter lists of the type used by Blue Point in 2006 are commodities – either they contain the requested information on requested voters or they do not. At the end of the day, the product is a list of requested voter information for a particular geographic area.

Under the common vendor conduct standard in the Commission's coordination regulation, the use of a common vendor by a third party such as CFGSA fulfills the conduct standard only if both of the following are present:

- First, the common vendor must use or convey to the third party either:
 - Information about the clearly identified candidate's campaign plans, projects, activities, or needs or his or her opponent's campaign plans, projects, activities, or needs; or
 - Information used previously by the common vendor in providing services to the candidate who is clearly identified in the covered communication or his or her authorized committee, opponent or opponent's authorized committee, a political party committee, or agent of any of the foregoing.

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- Second, for both of the above types of information conveyed or used by the common vendor, "the information [must be] material to the creation, production, or distribution of the [covered] communication."

11 C.F.R. § 109.21(d)(4)(iii). Because of this last requirement, the Commission does not consider the common vendor conduct standard to be a flat prohibition on the use of common vendors. *See* 68 Fed. Reg. at 436.

There is no allegation in this Matter that Tactical Data shared with Blue Point or CFGSA any information about Lamborn's campaign plans, projects, activities, or needs or those of Lamborn's opponents. In fact, the unrebutted testimony of Mr. Baker is that such information (and information about CFGSA's plans, projects, activities, or needs) was not exchanged. 2008 Baker Aff. ¶ 10.

In addition, the only information purportedly used by the Lamborn campaign that was passed to Blue Point was the commoditized voter list itself, involving the specifications that Blue Point requested. There is no allegation that the voter lists were specially prepared or specially designed for the Lamborn campaign or that they gave any special advantage to Blue Point or CFGSA. Instead, according to the testimony of Chris Baker, the voter list was not specifically packaged and the same information would have been received by any other list vendor. 2008 Baker Aff. ¶ 13. Chris Baker and Blue Point asked the vendor for certain types of voter information and did not ask for advice as to what voter list to use or how to use the list. *Id.* Although the vendor technically may have provided the same list to each entity (a fact that has not been established), such activity is more like a restaurant providing the same menu to different customers or Lexis or Westlaw providing the same information databases to the campaign and a third party. It is a straight-forward transmittal of an objective piece of information like the names and addresses of all of the radio stations in Virginia. As a result, there are no similarities between a commoditized voter list based on specifications from the consultant and the subjective, malleable, types of vendor activities on which the common vendor conduct standard focuses such as the development of the content of public communications, the selection of audiences, the development of media strategy, and the provision of political consulting.

In the same vein, even if Tactical Data did provide Blue Point with the voter list used for the Lamborn campaign, there still would be no coordination. The cut-and-dry *Tactical Data* voter list was not material to the mailings. As stated above, Blue Point could have purchased the data from other list vendors and those lists would

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have had the same effect on the CFGSA mailings. The fact that the list used came from Tactical Data is immaterial. One needs flour to make a cake, but whether the flour comes from Safeway or Giant is inconsequential. The fact that the data was also purportedly used by the Lamborn campaign is equally immaterial since Blue Point did not know this fact, had no reason to know, and Blue Point's request for a voter list had nothing to do with the Lamborn campaign. See 2008 Baker Aff. ¶ 13. Blue Point could not have sought to use the same list used by the Lamborn campaign since it had no knowledge that the campaign used this vendor or list.

Moreover, not only is it inconsequential that Tactical Data purportedly provided the same voter list to CFGSA as to the Lamborn campaign, but, if Tactical Data really is a vendor in common, it was inadvertent as well – from the vantage point of Blue Point and CFGSA. Blue Point used its best efforts to avoid using a vendor in common with the Lamborn campaign. Mr. Baker performed two types of due diligence. First, he researched campaign finance filings for a connection. 2008 Baker Aff. ¶ 12. Second, he asked a Tactical Data representative whether it worked for the campaign. *Id.*; Affidavit of Christopher K. Baker ¶ 8, dated Oct. 13, 2006 [hereinafter "2006 Baker Aff."]. Both aspects of his due diligence produced negative results. Mr. Baker and Blue Point did not know and had no reason to believe that Tactical Data worked for the Lamborn campaign and would have not used Tactical Data if they had known this information.² 2008 Baker Aff. ¶¶ 11-13. See also 2006 Baker Aff. ¶ 9 (discussing the use of Utah printers given the relationships of Colorado Springs-area printers).

Blue Point tried to avoid using a vendor in common with the Lamborn campaign. Nonetheless, it is immaterial if Tactical Data's voter list also was used by the Lamborn campaign. The list met the objective requirements dictated by Blue Point and did not provide any political advantage from or linked to the campaign. The common use of a commoditized voter list is not the focus of the common vendor conduct standard and such use does not equal coordination.

² Further, Chris Baker did not know and had no reason to know that Jon Hotaling was on the Board of Tactical Data. 2008 Baker Aff. ¶ 11.

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3. CFGSA Reaffirms Its Original Response and Did Not Coordinate Its Mailings

With respect to any other implied allegation of coordination on its part, CFGSA reaffirms its response in MUR 5774. Moreover, CFGSA has attached to this response an affidavit from Christopher Baker of Blue Point, who incorporates therein the entirety of his 2006 affidavit in MUR 5774.

The only direct allegations in this Matter are that Tactical Data supplied a voter list to Blue Point and that Tactical Data also supplied the same list to the Lamborn campaign. The common vendor conduct standard of the coordination regulations is addressed above. No other types of coordination have been alleged, nor could they be alleged in good faith given the testimony of Chris Baker.

First, Chris Baker is not a former employee of the Lamborn campaign. 2006 Baker Aff. ¶ 4.

Second, Blue Point did not work for the Lamborn campaign. *Id.*

Third, the Lamborn campaign and its agents were not materially involved, or involved in any way, in decisions about the CFGSA mailings. 2006 Baker Aff. ¶ 14.

Fourth, Blue Point did not create the mailings at the request or suggestion of the Lamborn campaign or its agents. 2006 Baker Aff. ¶ 11.

Fifth, Chris Baker and Blue Point did not have any discussions, much less substantial discussions, with the Lamborn campaign, a political party committee, or their agents about CFGSA's mail pieces or about CFGSA's or the Lamborn campaign's plans, projects, activities, or needs. 2008 Baker Aff. ¶¶ 10-13; 2006 Baker Aff. ¶¶ 12-14. While Chris Baker and Jon Hotaling did have a conversation, it concerned the possibility of an open seat in another part of Colorado and tangentially involved an inquiry about list vendors in Colorado as a whole. 2008 Baker Aff. ¶¶ 8-10. This conversation did not involve any discussions about CFGSA mailers, list vendors for Lamborn's district, or the projects, plans, activities, or needs of either CFGSA or the Lamborn campaign. 2008 Baker Aff. ¶ 10.

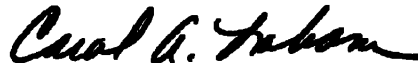
In sum, Blue Point and CFGSA did not violate any of the Commission's coordination conduct standards and, thus, did not coordinate with the Lamborn

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campaign. The Commission, based on the doctrine of res judicata and collateral estoppel, should simply dismiss this Matter. In the alternative, the Commission should again find no reason to believe that a violation occurred based on the actual facts of the matter.

Sincerely,



Carol A. Laham
D. Mark Renaud

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